Yugoslavia tribunal summons defense witnesses, grants safe conduct and authorizes videolink testimony

Paragraph 3 states that a summons shall impose an obligation to comply with it and that it shall be accompanied by a notice stating the consequences of non-compliance. The act refers to Article 9 (securing attendance of person as witness or to assist in investigations).

Articles 20 and 21 deal with orders for the preservation or restitution of property and with proceedings to determine the ownership of property. These are very useful provisions which, however, do not appear in most implementing legislation. Article 22 attaches immunity to the Tribunal and its staff. Paragraph 2 gives immunity from suit and legal process to counsel, advocates, solicitors, and witnesses, in respect of words spoken or written and documents or other evidence submitted by them before or to the International Tribunal. Articles 23-25 deal with warrants of arrest. Article 26 states that a prisoner in custody in the United Kingdom to be delivered up shall continue to be liable to complete any term of imprisonment in the United Kingdom.

Netherlands-United Nations, Exchange of Letters between the Government of the Kingdom of the Netherlands and the United Nations concerning an Agreement applying the provisions of the Agreement between the United Nations and the Kingdom of the Netherlands concerning the Headquarters of the International Criminal Tribunal for the Former Yugoslavia, concluded on July 24, 1994, *mutatis mutandis*, to the activities and proceedings of the International Tribunal for Rwanda in the territory of the Kingdom of the Netherlands, New York, 22/24 April 1996.[7] The treaty went into force on June 1, 1996.

Although the International Tribunal for Rwanda is located in Arusha, Tanzania, there are institutional links between the two Tribunals which require the agreement. This counts in particular, for the common Appeals Chamber and the common Prosecutor. Therefore it is self evident that certain activities and proceedings of the International Tribunal for Rwanda may be undertaken in The Hague from time to time.

B. Yugoslavia Tribunal Summons Defense Witnesses, Grants Safe Conduct and Authorizes Videolink Testimony

by André Klip

1. The Decision of the Trial Chamber

In the June 25, 1996 written decision in the *Tadic* case (Case No. IT-94-1-T), the Trial Chamber responded to on the defense motions to summon and protect defense witnesses, and on the giving of evidence by videolink. The Trial Chamber had already given an oral decision on the matter on May 7, 1996. It can only be speculated why it took the Trial Chamber so long to issue the written decision.

The motion was the consequence of the ongoing problems the defense has in contacting potential witnesses, such as threats to witnesses and fear of arrest by the prosecutor. The defense also experienced a lack of cooperation by the authorities in Bosnian Serb territory.

The prosecutor agreed to the request of the Defense to summon witnesses but opposed the requests for safe conduct, confidentiality and anonymity. Considering that the prosecutor agreed to the request by the defense for witnesses to be summoned, the Trial Chamber was willing to issue summonses on the basis of Rule 54 of the Rules of Procedure and Evidence: "The summons shall provide instructions relating to identification, insofar as possible, specify the time and place for the appearance, and shall set out the penalty for non-compliance. It shall also indicate the approximate allowances payable and the travelling and subsistence expenses which are reimbursable or pre-paid."

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[7] Published in Tractatenblad van het Koninkrijk der Nederlanden, Treaty Series of the Kingdom of the Netherlands, 1996, 143.

Along the lines of various provisions on safe conduct in mutual legal assistance treaties the Trial Chamber also issues a safe conduct on the basis of Rule 54. In justifying this decision, the Trial Chamber compares the Tribunal with states. The Tribunal finds itself in a similar situation because it does not have a police force of its own to secure the presence of witnesses at the seat of the International Tribunal. The order for safe conduct only grants a very limited immunity from prosecution. Four witnesses will receive the following safe conduct. "While in the Netherlands for the purpose of appearing before the International Tribunal to testify, [they] shall not be prosecuted, detained or subjected to any other restriction of their personal liberty in respect of acts or convictions prior to their departure from their home country. The immunity shall commence fifteen consecutive days before the witness is to appear before the International Tribunal and cease when the witness, having had for a period of fifteen consecutive days from the date when his presence is no longer required by the International Tribunal an opportunity of leaving, has nevertheless remained in the Netherlands, or having left it, has returned."

The Trial Chamber regards the limited restriction of the powers of the prosecutor reasonable in the light of the importance for the administration of justice of having the witnesses physically present before it. It might help the defense to produce vital witnesses. The summons shall contain a notice that a safe conduct does not bar prosecution from offences which the witness might commit after his departure from his home country. The safe conduct will remain applicable for a period of fifteen days from the date when the presence of the witness is no longer required by the Tribunal. The fifteen day period will commence again in case of illness or arrest (for a new crime) in the Netherlands after the witness has the opportunity to leave the country again. The Trial Chamber declined the request of the defense to include within the order for safe conduct, protection in the countries through which the witnesses travel to reach the International Tribunal. This was regarded as being too general.

The Trial Chamber indicates that it prefers the appearance of the witness before it, instead of using videolinks. However, with regard to some witnesses who are unwilling to come to the seat of the International Tribunal, it allows the use of videolink testimony. The Trial Chamber regards the evidentiary value of testimony provided by videolink weightier than that of testimony given by deposition, but not as weighty as testimony given in the courtroom. Where the defense relied on Rules 4 and 71 (D) in support of its request, the Trial Chamber held that these rules are not intended for the purpose of videolink testimony. "However, because of the extraordinary circumstances attendant upon conducting a trial while a conflict is ongoing or recently ended, it is in the interest of justice for the Trial Chamber to be flexible and endeavor to provide the Parties with the opportunity to give evidence by videolink." Again Rule 54 constitutes the legal basis for this decision. A request by the Prosecutor to change the location of the trial to abstain Prijedor as an alternative to videolink testimony was denied.

The criteria for allowing videolink testimony is that the testimony of the witness is shown to be sufficiently important to make it unfair to proceed without it and that the witness is unable or unwilling to come to the Tribunal. The Chamber has allowed this form of testimony for several alibi witnesses. It was refused for other witnesses where it was unclear whether they were unwilling or not, or when the witnesses did not give reasons for their refusal to appear in The Hague. The Trial Chamber provided for guidelines to be followed to ensure the orderly conduct of the proceedings when testimony is given by videolink. The party making the application should find an appropriate location which must be conducive to the giving of truthful and open testimony. The safety and solemnity of the proceedings at the location must be guaranteed. The non-moving party and the Registry must be informed at every stage of the efforts of the moving party and they must be in agreement with the proposed location. The Trial Chamber has a preference for certain locations: (i) an embassy or consulate; (ii) offices of the International Tribunal in Zagreb or Sarajevo; or, (iii) a court facility. The Chamber will also appoint a Presiding Officer to ensure that the testimony is given freely and voluntarily, and to inform the witnesses of their obligation to speak the truth because they are liable to prosecution in case of perjury. Testimony shall be given in the presence of the Presiding Officer only. The witnesses must, by means of a monitor, be able to see, at various times, the Judges, the accused and the questioner. Similarly the Judges, the accused and the questioner must each be able to observe the witness on their monitor. The statements made shall be treated as having be made in the courtroom and the witness shall be liable to prosecution for perjury in exactly the same way as if s/he had given evidence at the seat of the Tribunal.

Regarding confidentiality protection for witnesses for the defense the Trial Chamber refers to its decision on Protective Measures of August 10, 1995.[1] The Trial Chamber sees its task as ensuring that the curtailment of the public nature of the hearing is justified by circumstances such as the giving of evidence by victims of sexual assault and genuine fear for the safety of the witness or members of his family. The right to a public trial is not only a right of the accused. The world community has a right to be informed of the proceedings before the International Tribunal. In light of the general confirmation by the prosecutor that the fear of reprisal entertained by witnesses who will testify before the International Tribunal is well founded the Trial Chamber finds that the defense's request is appropriate with respect to the witnesses who have indicated fear of reprisals upon their return home.

With respect to the requested anonymity, the Trial Chamber applies the same criteria as regarding the Prosecutor's witnesses in the Protective Measures Decision of August 10, 1995. Fear of arrest can be taken away by using videolink testimony. The Trial Chamber therefore denies the request for anonymity.

2. Comment to the Decision

In issuing a summons, the Trial Chamber rightly compensates the limited powers and possibilities of the defense. Where the defense receives no cooperation, Tribunal requests must be complied with accordingly. In doing so, the Trial Chamber fulfills a prerequisite for a fair trial. By indicating that the witness should be informed about the penalty for non-compliance, the Trial Chamber apparently believes that there is also a personal obligation to comply with Tribunal's orders. (It will be interesting to see to what legal basis reference will be made.) There is nothing in the Rules about non-compliance of witnesses. Rule 77 deals with the obligation to answer questions when only before a Chamber.[2] While the Trial Chamber accepts that some witnesses that need not come to The Hague and may give testimony through video-links, it imposes an obligation on others. These positions seem in contradiction with each other. The question should also be raised whether a penalty for a witness for non-compliance with a summons would in practice have the consequence that person will also not be available for giving evidence by means of video-link. This is relevant because the Trial Chamber considers the latter as an alternative to the former.

Regarding safe conduct the Trial Chamber tries to find a balance between theory and reality. In theory, a safe conduct will never be necessary, because the powers and jurisdiction of the Tribunal are unlimited and extended over the entire world. States have to cooperate with orders of the Tribunal, even if they have to change their law(s) in order to comply with it. Giving a safe conduct to individual witnesses therefore means that the Tribunal voluntarily limits its own (and the Prosecutor's) powers.

The reality is of course different. Especially in the Serbian territories the actual powers of the Tribunal and of its prosecutor are in practice rather limited. The difficulties in obtaining the indicted Karadzic and Mladic before the Tribunal in The Hague are examples of that situation. In trying to find solutions to such problems, the Tribunal has to enter new legal land in almost any occasion. In this decision the Trial Chamber tries to have their cake and eat it too. This leads to some contradictive results.

The temporary safe conduct applies in the Netherlands only. This is rather strange. Safe conduct provisions that have been known for almost 150 years now in extradition treaties and treaties on mutual legal assistance all have one element in common. A safe conduct applies to the whole jurisdiction of the court or state issuing it. In this case

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[1] *See also* André Klip, *Yugoslav War Crimes Tribunal Takes Protective Measures for Victims and Witnesses*, 11 INT'L ENFORCEMENT L.REP. 420-422 (Oct.1995).

[2] I regard both Rule 77 and Rule 91, introducing new crimes as being beyond the mandate given to the Judges of the Tribunal in Article 15 of the Statute to adopt rules of procedure and evidence. *See* André Klip, *Witnesses before the International Criminal Tribunal for the Former Yugoslavia*, 67 INT'L REV. OF PENAL L. XX (forthcoming).

the Tribunal which has jurisdiction throughout the world, limits the safe conduct to the Netherlands. The comparison drawn by the Trial Chamber between states that have issued orders for safe conduct for witnesses beyond their jurisdiction and the situation of the Tribunal, overlooks that the Tribunal summonses witnesses within its jurisdiction. While a safe conduct in cooperation in criminal matters normally must be regarded as a bilateral agreement between states, here it is a unilateral guarantee. The order is written as if it is issued by a criminal court of the Netherlands, not by a United Nations International Criminal Tribunal. In its effect the order is directed to the authorities of the Netherlands (who were already bound by the safe conduct provision of Article XVIII of the Host Country Agreement between the Netherlands and the United Nations) and to the Prosecutor of the Tribunal for his or her actions within the Netherlands.

The effect is the absence of legal impediment for the prosecutor to use his or her powers and to ask any other country in the world except the Netherlands to arrest and to detain the witness, while travelling to or from the Netherlands. The prosecutor may request the state of residence or a transit state to make such an arrest. Whether the prosecutor does so, certainly that in the future no witness who would otherwise be willing to show up in The Hague will ever do so. One must not forget that a safe conduct serves to remove distrust and fear on the side of the witness. This limited safe conduct is not sufficient to fulfil that function, partly due to a bad start. The Tribunal has generally discouraged witnesses from coming to The Hague, by taking two of them into custody.[3]

The decision not to extend the safe conduct to transit states contradicts with Article 11 of the Tentative Guidelines for National Implementing Legislation issued by the Tribunal itself: "The State guarantees the immunity of persons in transit for the purpose of appearing before the International Tribunal." As a consequence some states (Finland, Spain, Austria, The Netherlands) have legislated a safe conduct provision accordingly.

Other elements correspond much better with the rationale behind a safe conduct. The witness will be informed about the exact dates commencing and expiring the safe conduct in the Netherlands. The Prosecutor may not take the opportunity from any misfortune to the witness by illness or arrest by the Netherlands for any new crimes, which might prevent him from leaving the country.

The decision to allow videolink testimony should be welcomed in all its aspects. The Trial Chamber underlines the preference for having the witness in the courtroom. However, testimony by using videolink could present a sufficient alternative, second best option. The guidelines to be followed in case of this testimony all tend to create a situation in which only the location of the witness is different from the courtroom. This corresponds to the rationale behind the use of this technique to take away an obstacle for testifying.

C. Italian Court Dismisses War Crimes Cases against Priebke, But His Detention Continues Pending German Extradition Request

On August 1, 1996, an Italian military court dismissed charges against former Nazi SS captain Erich Priebke as a result of statute of limitations difficulties.[1] Nevertheless, Priebke was rearrested hours after the dismissal because prosecutors from the city of Dortmund, northeast of Bonn, indicated they intend to make a formal application for his extradition.[2]

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[3] *See* in this respect the Transfer order and the order for detention for General Djorde Djukic and Colonel Aleksa Krsmanovic, issued by Judge Stephen on February 12, 1996 (Case No. IT-96-19-Misc.1). *See* Bruce Zagaris, *Bosnia Hands Over Two Persons to War Crimes Tribunal and Accord Reached on Rules on Arrest of Future Suspects*, 12 INT'L ENFORCEMENT L.REP. 112-115 (Mar. 1996).

[1] Vera Haller, *Rome Atrocity Panel Frees Ex-Nazi Officer*, WASH. POST, Aug. 2, 1996, at A16, col. 5.

[2] Judy Dempsey, *Germany May Seek Extradition of Priebke*, Fin. Times, Aug. 3-4, 1996 at 2, col. 2.